No. 17-340

IN THE

Supreme Court of the United States

NEW PRIME, INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Rarely has a litigant in this Court gone to such lengths to distort the plain meaning of a statute. Respondent and his cadre of arbitration-hostile amici ask this Court to exempt an entire sector of workers from arbitration, disturbing a century-old understanding of the Federal Arbitration Act ("FAA"), by adopting counterintuitive interpretations not only of the phrase "contracts of employment," but also the terms "seamen," "railroad employees," and even the word "of." If respondent is to be believed, nearly every word in the Section 1 exemption means something unexpected.

There is a much simpler solution: Section 1 of the FAA means what it says. As this Court has unanimously held, "'[w]here the words of a law ... have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded.'" *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 32 (2004) (quoting *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 89–90 (1823)). "This is a maxim of law, and a dictate of common sense; for were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements, or rest upon his own understanding of a law, until a judicial construction of those instruments had been obtained." *Green*, 21 U.S. at 90.

Here, the meaning of "contracts of employment" is plain and obvious: contracts establishing an employer-employee relationship. The only dictionary cited by either party defining that term traces this commonsense interpretation to 1927, just two years after the FAA was enacted. Petr. Br. at 17 (citing *Black's Law Dictionary* 393 (10th ed. 2014)). If that

weren't clear enough, the FAA limits the Section 1 exemption to *particular* contracts of employment—those of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Because seamen and railroad employees refer only to common-law employees, and not independent contractors, so too the catchall category must refer only to common-law employees. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (applying *ejusdem generis*). Thus, Section 1 exempts the "contracts of employment" of "employees"—not exactly a linguistic enigma.

Moreover, that plain and obvious meaning of the Section 1 exemption is consistent with the reason Congress created the exemption in the first place—not to *prevent* arbitration in the transportation sector, but to preserve *industry-specific* arbitration statutes. *See Circuit City*, 532 U.S. at 121. Those industry-specific statutes applied only to common-law *employees*. Thus, redefining "contracts of employment" to include independent-contractor agreements would have the perverse effect of leaving transportation-sector independent contractors on a jurisprudential island, unique among all workers as categorically barred from agreeing to arbitrate disputes both under the FAA and the industry-specific statutes that the Section 1 exemption was meant to preserve. That cannot be—and is not—the law.

I. Applicability Of The Section 1 Exemption Has Been Delegated To An Arbitrator

As an initial matter, the underlying dispute between the parties—whether respondent was properly classified as an independent contractor or was instead a misclassified employee—should be resolved by an

arbitrator, not a court. Respondent's allegations leave no doubt that he was dissatisfied with the work he performed as an independent contractor; for whatever reason, he believes he was unable to earn a satisfactory living under that arrangement, as many other independent contractors do. Resp. Br. at 9. That is why respondent elected (as he was free to do all along) to terminate his independent-contractor agreement and become an employee of New Prime instead—a position he also left after a short period of time. J.A. 121–22.

But respondent's factual allegations, which have not yet been tested in any judicial or arbitral proceeding, have no bearing on the principal issue before this Court: Who should hear the parties' dispute? The answer to that question does not require any fact-finding because respondent does not deny signing a valid arbitration agreement with an enforceable delegation clause, under which he agreed to refer to arbitration "any disputes as to the rights and obligations of the parties, *including the arbitrability of disputes between the parties.*" J.A. 82, 102–03 (emphasis added). This Court has time and again confirmed that such delegation clauses are enforceable. *See, e.g.*, *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 75–76 (2010); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

Respondent argues that the parties' dispute cannot be delegated to an arbitrator because of the subsidiary question whether the FAA applies—an issue that respondent says does not concern "the arbitrability of disputes" between the parties. Resp. Br. at 17. It is unclear, however, what respondent thinks this appeal is about if not "arbitrability"—he wants both the underlying misclassification question and the question of FAA applicability to be resolved by a court

and opposes New Prime's efforts to arbitrate those matters. That is the very essence of an arbitrability issue.

Respondent also argues that the district court was without power to order arbitration because of the "limits the FAA places on [its] authority." Resp. Br. at 18. But the FAA does not place *any* limits on a district court's authority. Contrary to the assumption underlying respondent's position, the FAA is not a jurisdictional statute—it does not define the outer limits of federal judicial authority, as do the cases cited by respondent. *See* Resp. Br. at 18–19 (citing "cases where the contract did not involve interstate commerce, or where the statute does not provide district courts [with] jurisdiction"). The FAA is merely one procedural mechanism for compelling arbitration, which serves to preempt state laws (as well as state and federal judges) that are hostile to arbitration. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341–42 (2011). It is not the exclusive means of ordering arbitration where the parties have agreed to it.

Thus, provided a court has jurisdiction over the controversy, as the district court unquestionably did here (J.A. 111), the court has "inherent" authority to stay its own hand pending an alternative dispute resolution mechanism of the parties' choosing. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879 n.6 (1998) (discussing "district courts' discretion to defer discovery or other proceedings pending the prompt conclusion of arbitration"); 11 Wright & Miller, *Federal Practice & Procedure* § 2901 (3d ed. 2018) ("[S]tays prior to judgment, [or] to await a decision in another forum, ... are left to the inherent power of the court."). There is no justification for the court simply to *ignore* the parties'

agreement to arbitrate threshold arbitrability issues, as respondent urges. "Having made the bargain to arbitrate, the party should be held to it." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

In any event, courts, including this Court, routinely compel parties to arbitrate threshold arbitrability questions under the FAA, even where those issues will determine the FAA's applicability. *See, e.g.*, *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1429 (2017) (compelling arbitration of the question whether an arbitration agreement was validly formed). Arbitrators are just as competent as judges to determine such issues. *See Mitsubishi Motors Corp.*, 473 U.S. at 628.[1]

II. Section 1 Does Not Exempt Independent-Contractor Agreements From The FAA

A. "The words of a statute are to be taken in their natural and ordinary signification and import." 1 James Kent, *Commentaries on American Law* 432 (1826); *see Green*, 21 U.S. at 90 ("plain and obvious meaning" controls). Indeed, the plain-meaning rule

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[1] Respondent relies on *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), for the proposition that "the 'first question' a court must answer—*before* it can compel arbitration—is whether the FAA applies at all." Resp. Br. at 15. But *Prima Paint* did not involve a delegation clause. Similarly, respondent cites *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012), and *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), for the proposition that "this Court has repeatedly decided for itself questions about whether it has authority to compel arbitration under the FAA—even where the contract at issue contained a delegation clause." Resp. Br. at 18–19. But defendants in those cases waived the right to compel arbitration under their delegation clauses.

has been described as the "most fundamental semantic rule of interpretation" because "[i]nterpreters should not be required to divine arcane nuances or to discover hidden meanings" in a legal text. Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012) (citing Joseph Story, *Commentaries on the Constitution of the United States* 157–58 (1833)). Yet that is what respondent asks this Court to do.

Here, the term "contracts of employment" has a "plain and obvious meaning"—a contract that establishes an employer-employee relationship. That is precisely how a leading law dictionary says the term was used as early as 1927. *See Black's Law Dictionary* 393 (10th ed. 2014) (defining the term as "[a] contract between an employer and employee in which the terms and conditions of employment are stated" and tracing its origins). Respondent urges the Court to disregard this authority because it was "published nearly a century after the FAA was passed" and therefore "cannot possibly shed light on the ordinary meaning of the phrase 'contract of employment.'" Resp. Br. at 36–37. But the publication date of a dictionary has no bearing on the validity of its etymological analysis. *See Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 271–72 (2013) (citing 1989 edition of the *Oxford English Dictionary* in determining the definition of "defalcation" in 1867).

Contemporaneous legal texts are in accord. For example, a treatise on business law published in 1920 contains an entire chapter entitled "The Contract of Employment," which explains that "[a] contract of employment is a contract for the performance of services, by the terms of which the employer is to direct how

the work is to be done and what results are to be accomplished." 1 Thomas Conyngton, *Business Law: A Working Manual of Every-day Law* 302 (2d ed. 1920). Indeed, "the peculiar and distinguishing element of the contract of employment is that the party for whom the services are to be performed has the right to direct the other party in what he is to do"—a key characteristic of common-law employment. *Id.* Therefore, "[a] contract to build a house where the builder merely agrees to construct a house according to certain plans to be furnished by an architect and to the satisfaction of the person for whom he is building it"—that is, an independent-contractor agreement—"is not a contract of employment." *Id.* at 302–03.

Modern sources dedicated to explaining "contracts of employment" confirm this historical understanding. *See* Katherine V.W. Stone, "The Decline in the Standard Employment Contract: A Review of the Evidence," *in Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* 366, 366 (Katherine V.W. Stone & Harry Arthurs eds., 2013) ("The essence of the standard contract of employment was the long-term employment of an employee by a single employer over a working life."); Jeremias Prassl & Einat Albin, "Employees, Employers, and Beyond: Identifying the Parties to the Contract of Employment," *in The Contract of Employment* 341, 345 (Allan Bogg et al. eds., 2016) ("In our received understanding, the 'contract of employment is that form of contract for personal service which the courts recognize as expressing the social relationship of employer and employee, as opposed to the other relationship of employer and independent contractor.'").

Notably, respondent does not cite a single dictionary or treatise that defines "contracts of employment"

to include independent-contractor agreements.[2] Instead, he asks the Court to "divine arcane nuances" and "discover hidden meanings" in a hodgepodge of inapposite sources that no ordinary person—in 1925 or today—could be expected to compile or consult. *See* Resp. Br. at 26–30. This is exactly what the plain-meaning rule is meant to avoid.

For all the ink spilled by respondent identifying isolated instances in which the phrase "contracts of employment" was used unthinkingly to include independent-contractor agreements, those sources do not reveal anything about the *ordinary* meaning of the term—much less its ordinary meaning *as used in the FAA*. None of respondent's sources arises in the context of the FAA or arbitration, and most do not address employment classification, focusing instead on breach-of-contract and other pedestrian legal disputes.[3]

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[2] Respondent accuses New Prime of "misleadingly omit[ting] the key words 'exercising an independent employment'" from the definition of "independent contractor" in *Bouvier's Law Dictionary*. Resp. Br. at 34–35 n.6. But the omitted text is irrelevant to New Prime's point—that when the FAA was enacted, it was well established that employees and independent contractors were different. Petr. Br. at 17. If anything, the omitted phrase supports New Prime's point by confirming that, unlike employees, independent contractors do not have a dependent employment relationship with their principal.

[3] *See, e.g.*, *Bailey v. United States*, 43 Ct. Cl. 353, 355–57 (1908) ("Claimant now seeks recovery for the entire amount of compensation provided for by the terms of his contract of employment."); *Connell v. U.S. Sheet & Window Glass Co.*, 2 La. App. 93, 104 (1925) ("We recognize the right of plaintiff's attorney, under his contract of employment, ... for the amount of their professional fees on all judgments obtained by them."); *Martin v. Dixon*, 241 P. 213, 216 (Nev. 1925) ("It is contended, however, that the relation of attorney and client had ceased, and that the

"That a definition is broad enough to encompass one sense of a word does not establish that the word is *ordinarily* understood in that sense." *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 568 (2012). "The definition of words in isolation ... is not necessarily controlling in statutory construction," as "[a] word in a statute may or may not extend to the outer limits of its definitional possibilities." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006); *see also Chamber of Commerce v. Whiting*, 563 U.S. 582, 612 (2011) (Breyer, J., dissenting) ("[N]either dictionary definitions nor the use of the word 'license' in an unrelated statute can demonstrate what scope Congress intended the word 'licensing' to have *as it used that word in this federal statute*. Instead, the statutory context must ultimately determine the word's coverage.").

This is especially so where, as here, the identified usages occurred in different contexts. After all, "[w]here the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different, ... the meaning well may vary to meet the purposes of the law." *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932); *see also King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("[O]ftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context,'" and "[s]o when deciding whether the language is plain, we must read the

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court found that Dixon's contract of employment as attorney was completed."). And in several of respondent's cases, the opinion does not use the term "contracts of employment" at all; respondent instead cites the case syllabus. *See, e.g.*, *Caron v. Powers-Simpson Co.*, 104 N.W. 889, 889 (Minn. 1905); *Kaw Boiler Works v. Frymyer*, 227 P. 453, 453 (Okla. 1924); *Waldron v. Garland Pocahontas Coal Co.*, 109 S.E. 729, 729 (W. Va. 1921); *see also Johnson v. Comm'r*, 14 B.T.A. 605, 606 (1928) (findings of fact).

words 'in their context and with a view to their place in the overall statutory scheme'"). This makes eminent sense, as words often take different meanings depending on the context in which they are ... employed.

In any event, for every decontextualized source cited by respondent using the term "contract of employment" broadly, there are at least as many using the term in the ordinary sense to describe common-law employer-employee arrangements. *See, e.g.*, 1 Conyngton, *supra*, at 301–11 (repeatedly using the term "contract of employment" to describe contracts establishing common-law employment relationships); 2 Thomas Conyngton, *Business Law: A Working Manual of Every-day Law* 781–83 (2d ed. 1922) (providing form "Contract[s] of Employment"); Nicholas H. Dosker, *Manual of Compensation Law: State and Federal* 8 (1917) ("The rules for determining the existence of the relation of employer and employee are the same as those at common law for the relation of master and servant. ... Therefore, in order to recover compensation a contract of employment between the injured person and the employer ... must be shown.").

And when courts and Congress used the term *in the context of employment classification issues*, they typically excluded independent contractors. *See, e.g.*, *Coppage v. Kansas*, 236 U.S. 1, 13 (1915) ("[D]oes not the ordinary **contract of employment** include an insistence by the employer that the employee shall agree, as a condition of the employment, that he will not be idle and will not work for whom he pleases, but will serve his present employer, and him only, so long as the relation between them shall continue?"); *Newland v. Bear*, 218 N.Y.S. 81, 81–82 (N.Y. App. Div. 1926) ("The question is whether claimant's status was that of employee or independent contractor. ... The

burden was upon the claimant to establish a **contract of employment**."); *Anderson v. State Indus. Accident Commission*, 215 P. 582, 583, 585 (Or. 1923) (noting in appeal from a determination that a worker "was not a workman within the meaning of the Workmen's Compensation Act, but an independent contractor," that "[t]o create this relation [of workman] there must be a **contract of employment**"); *Brewer v. Dep't of Labor and Indus.*, 254 P. 831, 832 (Wash. 1927) ("Whether Brewer was an employee depends upon whether there was a complete and final **contract of employment**."); H.R. 10311, 69th Cong., 67 Cong. Rec. 6991 (1926) ("It shall furthermore be unlawful in the District of Columbia for any person under employment *or working for hire* to engage in labor under such **contract of employment** *or hire* on the Lord's Day, commonly called Sunday, except in works of necessity and charity.").

The Congress that enacted the FAA would have expected the Section 1 exemption, and particularly the term "contracts of employment," to be interpreted within its statutory context, rather than in the decontextualized manner urged by respondent. Contemporaneous treatises on statutory interpretation confirm as much. *See, e.g.*, J.G. Sutherland, *Statutes and Statutory Construction* 325–26 (1891) ("The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense they were intended to be used as they are found in the act."); Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws* 318–20 (2d ed. 1911) ("[T]o arrive at the true meaning of any particular phrase in a statute, that particular expression is not to be viewed detached from its context in the statute; it is to be viewed in connection with its whole context.").

Indeed, by 1925, Congress knew how to draft a statute that covered more than just common-law employees when it so desired. It did so in the Foran Act, which prohibited immigration under any "contract or agreement ... to perform labor or service of any kind." 23 Stat. 332 (1885). It did so again in the Erdman Act, which encompasses "all persons actually engaged in any capacity in train operation or train service of any description." 30 Stat. 424 (1898). And it did so in the Adamson Act, which established an eight-hour workday for all workers "who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of person or property on railroads." 39 Stat. 721, 721–22 (1916). But it did *not* do so in the FAA.

B. The plain meaning of the term "contracts of employment" as encompassing only common-law employer-employee relationships is confirmed by reading the term, as one must, in the context of the whole statute. *See Dolan*, 546 U.S. at 486 ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.").

1. The Section 1 exemption does not apply to *all* "contracts of employment"—only contracts of employment "of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Under the doctrine of *noscitur a sociis*, the term "contracts of employment" must take its meaning from these juxtaposed terms. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps .... This rule we rely upon to avoid ascribing to one word a

meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'").

Because "seamen" and "railroad employees" are terms that encompass only common-law employees, the residual category ("any other class of workers") must share the relevant characteristics of the enumerated terms, as this Court has already held. *See Circuit City*, 532 U.S. at 114–15 ("The wording of § 1 calls for the application of the maxim *ejusdem generis*.").[4] Thus, when viewed as a whole, the Section 1 exemption applies only to the "contracts of employment" of interstate transportation "employees."

Once again, respondent engages in linguistic gymnastics to establish that "seamen" and "railroad employees" include independent contractors. Resp. Br. at 40–42. But respondent's arguments are again refuted by the ordinary meaning of those terms.

The term "seamen" is ordinarily understood to include only traditional common-law employees. Respondent suggests that "[s]eamen were defined functionally—by their work aboard a vessel—not their employment status." Resp. Br. at 40. But these are not mutually exclusive; as this Court has explained, "the essential requirements for seaman status are twofold." *Chandris, Inc. v. Latsia*, 515 U.S. 347, 368 (1995). First, "an employee's duties must contribut[e] to the function of the vessel or to the accomplishment

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[4] *Circuit City* held that the residual category must be limited to "transportation workers," as opposed to workers in other sectors, because that was the relevant distinction at issue in that case. 532 U.S. at 119. But that does not mean there can be no *other* relevant characteristic, as respondent contends. Resp. Br. at 39–40.

of its mission." *Id.* (quotation marks omitted). Second, "a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is *substantial in terms of both its duration and its nature*." *Id.* (emphasis added). Of course, the hallmark of an independent contractor is the *absence* of a substantial connection to the principal in terms of duration and nature. *See* Restatement (First) of Agency § 220(2) (1933).

Thus, although the term "seamen" can extend to a wide range of workers aboard vessels—not just those "'who can hand, reef, and steer,'" *The Sea Lark*, 14 F.2d 201, 201 (W.D. Wash. 1926)—it does not extend to independent contractors. *See id.* (the term includes "[t]he cook and surgeon, and [other] *employees*") (emphasis added).[5]

Of particular relevance is the Jones Act, which Congress passed in 1920. That statute provides that "[a] seaman injured in the course of employment ... may elect to bring a civil action at law, with the right of trial by jury, against the employer." 46 U.S.C.

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[5] Respondent states that "[a] ship's surgeon ... was an independent contractor—'not the ship owner's servant,'" yet was still deemed a "seaman." Resp. Br. at 40 (quoting *Allan v. State S.S. Co.*, 132 N.Y. 91, 99–100 (1892)). But the case he quotes did *not* hold that a physician aboard a ship was an independent contractor. Rather, the case stands for the uncontroversial proposition that a ship owner cannot interfere with a physician's discharge of his professional duties: "The physician ... in the care and attendance of the sick passengers, ... is independent of all superior authority except that of his patient, and the captain of the ship has no power to interfere except at the passenger's request." *Allan*, 132 N.Y. at 99–100.

§ 30104. As courts have long recognized, "as a prerequisite to recovery under the Act, the plaintiff must establish an employment relationship with the defendant." *Evans v. United Arab Shipping Co. S.A.G.*, 4 F.3d 207, 215 (3d Cir. 1993); *see also Bach v. Trident Shipping Co., Inc.*, 708 F. Supp. 772, 773 (E.D. La. 1988) ("It is now well established that an employer-employee relationship is essential for recovery under the Jones Act."). And it is clear that independent contractors *cannot* sue under the Jones Act. *See* David W. Robertson, *The Supreme Court's Approach to Determining Seaman Status: Discerning the Law Amid Loose Language and Catchphrases*, 34 J. Mar. L. & Com. 547, 578 n.178 (2003).

Similarly, the term "railroad employees" is ordinarily understood to cover only common-law employees—not independent contractors. Where, as here, "Congress has used the term 'employee' without defining it, [the Court] ha[s] concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–40 (1989); *see also* 1 Conyngton, *supra*, at 303 ("Independent contractors are not employees."). In fact, there is a "*presumption* that Congress means an agency law definition for 'employee' unless it *clearly indicates* otherwise." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 325 (1992) (emphases added). This presumption is not easily overcome. For example, in the Fair Labor Standards Act, "the term 'employee' had been given 'the broadest definition that has ever been included in any one act,'" *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945), but still excluded independent contractors, *see Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947).

Respondent points to no evidence that Congress "clearly indicate[d]" the term "railroad employees" in the FAA to mean anything other than common-law employees. In fact, the only support respondent can muster for his expansive and counterintuitive interpretation of the term is a handful of decisions from the Railway Labor Board ("RLB"), interpreting the Transportation Act of 1920. *See* Resp. Br. at 41–42. But the RLB was a discredited body that was roundly criticized for getting the law *wrong*, and was swiftly replaced by Congress. In 1924, one year before enacting the FAA, Congress began debating the Railway Labor Act, which disbanded the RLB when it was enacted in 1926. "It is commonplace that the 1926 Railway Labor Act was enacted because of dissatisfaction with ... the Railway Labor Board." *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 580 (1971). And the Railway Labor Act expressly states that "[t]he term 'employee' as used herein includes every person in the service of a carrier (*subject to its continuing authority to supervise and direct the manner of rendition of his service*)"—in other words, only common-law employees. 45 U.S.C. § 151 (emphasis added).

In addition, the RLB's interpretations are irrelevant because "the powers conferred on the Railway Labor Board ... were advisory only, with no coercive effect whatsoever other than the sanction and force of public opinion." *Barnhart v. W. Md. Ry. Co.*, 128 F.2d 709, 712 (4th Cir. 1942) (citing *Penn. R.R. Sys. v. U.S. R.R. Labor Bd.*, 261 U.S. 72 (1923)).

Because "seamen" and "railroad employees" encompass only common-law employees, the residual clause "any other class of workers" must be read similarly to exclude independent contractors.

2. Respondent next urges this Court to *ignore* the meaning of "seamen" and "railroad employees" because, according to respondent, those words have no effect on the meaning of "contracts of employment." Resp. Br. at 44. This is so, says respondent, because the word "of" means "belonging to," and "[n]ouns do not change meaning based on the people to whom they belong." *Ibid.*

Again, however, respondent's argument does not comport with the ordinary way in which people use language. In plain English, a noun takes its meaning, in part, based on the context of the sentence in which it appears. Thus, the tools of a carpenter are widely understood to be different from the tools of a plumber—even though the noun "tools" is the same in both phrases. A person would not propose to his significant other with a ring of Saturn, nor take a beach vacation with the clothes of a ski instructor. That is because the word "of" does not simply mean "belonging to" in that context; it also "indicate[s] a particular example of a class denoted by the limited noun," and "denot[es] a relationship" between the words preceding and succeeding it. *Webster's New International Dictionary* 1492 (1909).

Thus, when Congress speaks of the "contracts of employment" of "seamen," "railroad employees," and other similarly situated workers, it is illuminating the types of contracts at issue.

3. Respondent's sweeping interpretation of the term "contracts of employment" is also belied by the purpose and policies underlying the FAA and the Section 1 exemption. In enacting the FAA, Congress established "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). And while the

Section 1 exemption limited the purview of the Act, it did not curtail the policy the Act embodies. The Section 1 exemption was not crafted for the purpose of exempting transportation workers from arbitration, but to funnel certain of them into a *different* arbitration regime.

As this Court has explained, "[b]y the time the FAA was passed, Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers," and "the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes was imminent." *Circuit City*, 532 U.S. at 120–21. Accordingly, "[i]t is reasonable to assume that Congress excluded 'seamen' and 'railroad employees' from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers." *Id.* at 121.

But none of these "dispute resolution schemes covering specific workers" encompassed independent contractors. Indeed, "the history of labor arbitration is inextricably entwined with that of collective bargaining and the broader history of labor." Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 Fla. L. Rev. 373, 375 (1983). At the turn of the 20th Century, labor disruptions paralyzed commerce as "[r]ailroad unions increasingly relied on strikes and boycotts" to extract concessions from management, "while railroad companies preferred court orders" to break these efforts. *Id.* at 383. Beginning in 1888, Congress enacted a series of arbitration statutes designed to resolve these disputes through mediation and arbitration. At every step of the way, these statutes focused on labor unions and the common-law

employees they represented—many even went so far as to exclude "unorganized employees." *Id.* at 384. And the culmination of these efforts, the Railway Labor Act, was the direct result of "a series of conferences" between "[r]ailway executives and union officials," aimed at "drafting a new law ... [that] largely embodied the principles agreed to by employers and unions." *Id.* at 386.

As set forth above, the dispute-resolution procedures established in the Railway Labor Act apply only to common-law employees. Once again, respondent asks the Court to ignore this statute in favor of the RLB's discredited interpretations of the Transportation Act, asserting that "Congress' goal was to avoid disrupting 'developing' *and 'established'* dispute resolution schemes," and that the Railway Labor Act "didn't even exist yet." Resp. Br. at 53. But Congress began debating the Railway Labor Act—for the purpose of abolishing the RLB—in 1924, and was continuing to do so at the time it enacted the FAA. As this Court has recognized, the Railway Labor Act was an important consideration at the time Congress enacted the FAA. *See Circuit City*, 532 U.S. at 121 ("When the FAA was adopted ... the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes was imminent, *see* Railway Labor Act of 1926."). Ignoring the Railway Labor Act would be especially inappropriate given that it "provided a model for other industries." Nolan & Abrams, *supra*, at 382.

Likewise, the Shipping Commissioners Act of 1872 established shipping commissioners to "hear and decide any question whatsoever between a master, consignee, agent, or owner, and any of his crew." 17 Stat.

262, 267, c. 322, § 25. The scope of this Act is coextensive with the Jones Act, which, as described above, covers only common-law employees. *See Gerradin v. United Fruit Co.*, 60 F.2d 927, 929 (2d Cir. 1932); *see also The Inland*, 271 F. 1008, 1009–10 (E.D.N.Y. 1921), *aff'd* 279 F. 1018 (2d Cir. 1922) (describing the "procedure before the shipping commissioner," and noting that "[i]f a seaman" is "discharged," then "the relation of master and servant is severed").

Respondent claims that the term "crew" in the Shipping Commissioners Act applies "'without reference to the nature of the arrangement under which they are on board,'" Resp. Br. at 51, but the case quoted for that proposition involved neither the Shipping Commissioners Act nor an issue of worker classification; rather, the question was whether a libellant qualified as a member of a ship's "crew" even if the contract of employment was void. *The Bound Brook*, 146 F. 160, 164 (D. Mass. 1906).

Adopting respondent's interpretation of the Section 1 exemption would leave independent contractors in a legal no-man's land. They would be precluded from agreeing to arbitration under *both* the FAA *and* the industry-specific regimes that the Section 1 exemption was drafted to preserve. It would also throw into jeopardy arbitration provisions in transportation agreements between companies—not only contracts between New Prime and LLCs, as in this case, but contracts between retailers and delivery companies—as respondent insists that the FAA does not apply to "*any* work agreement." Resp. Br. at 1; *see also id.* at 24 (defining "employment" to include "[w]ork or business of any kind," and clarifying that it "does not necessarily import an engagement or rendering services

for another"). It could even extend to agreements between a corporation or partnership and its shareholders or partners. *See Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 442 (2003) (presenting question whether "shareholders and directors of a professional corporation should be counted as 'employees'"). This is far outside the realm of what anybody, in 1925 or today, would expect the Section 1 exemption to encompass, and it would vitiate the FAA and the strong policy in favor of arbitration it embodies in one of the largest sectors of the American economy.

* * *

Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). And it did not do so in the FAA. This Court should interpret the Section 1 exemption consistent with its plain meaning, its statutory context, and the purpose it was enacted to achieve, and conclude that the term "contracts of employment" encompasses only contracts that purport to establish a common-law employer-employee relationship.

C. In this case, that means respondent's contract falls outside the Section 1 exemption. The Operating Agreement at issue here states that it "establish[es] an independent contractor relationship at all times," and that respondent "shall determine the means and methods of performance" of his obligations, has "the right to provide services for another carrier during the term of th[e] Agreement," and can "refuse to haul any load offered" by New Prime. J.A. 65, 86. These are classic indicia of an independent-contractor relationship—not a common-law employer-employee relationship. *See* Restatement (First) of Agency § 220. And respondent does not contend otherwise. *See* Resp. Br.

at 62 (stating only that the Operating Agreement is "exempt from the FAA" because it is "a transportation worker's agreement to perform work").

CONCLUSION

The judgment of the Court of Appeals for the First Circuit should be reversed.

Respectfully submitted.

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August 22, 2018